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No. 579

In the Supreme Court of the United States

OCTOBER TERM, 1951

INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

v.

JAMES MCWILLIAMS BLUE LINE, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

In the United States District Court
Southern District of New York

Civil No. 65-270

JAMES McWILLIAMS BLUE LINE, INC., T. A. D. JONES & CO., INC., WYATT, INC., THE HARTFORD ELECTRIC LIGHT CO., and THE UNITED ILLUMINATING COMPANY, PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the Interstate Commerce Commission and railroads, signatories hereto, intervening defendants, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

OPINION BELOW

The opinion of the District Court for the Southern District of New York is reported at 100 F.Supp. 66. A copy of the opinion and judgment are attached hereto as Appendix A.

JURISDICTION

The judgment of the District Court was entered on November 9, 1951. A petition for appeal is presented to the District Court herewith, to wit, on January 8, 1952.

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Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). *United States* v. *Capital Transit Co.*, 338 U.S. 286 (1949).

QUESTION PRESENTED

Whether the Interstate Commerce Commission exceeded its statutory authority in holding that the proportional rates assailed herein do not contravene Section 2 of the Interstate Commerce Act.*

STATUTES INVOLVED

Sections 2, 15(a), and 303(b) of the Interstate Commerce Act and the Declaration of National Transportation Policy are set forth in Appendix B hereto.

STATEMENT

Appellees are two coal dealers who own tidewater docks at New Haven, Conn., two consumers of coal at New Haven and Hartford, and a barge line which hauls coal from New Haven to Hartford. These parties filed a complaint with the Commission, alleging that the rates of the Pocahontas lines ** applicable to the transportation of bituminous coal from the southern Appalachian coal fields to the Port of Hampton Roads, Va., for transshipment by ocean-going vessels to ports in New England, such as New Haven, and thence by barge to interior destinations, such as Hartford, violate Sections 1, 2, and 3 of the Interstate Commerce Act. The Commission dismissed the complaint. The District Court set aside the Commission's order, holding that the

* All points raised in the Assignment of Errors are also presented. The Question Presented stated above sets forth the major issue.

** Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, and The Virginian Railway Company.

assailed rates violated Section 2 of the Act and contravened the decision of the Supreme Court in *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567 (1947).

At the outset, it is imperative that the rate structure which the District Court has declared to be unlawful be clearly understood. Railroads hauling bituminous coal from the Appalachian coal fields, both the northern, centering around southwestern Pennsylvania, and the southern, centering around southern West Virginia, maintain both local and proportional rates to the North Atlantic Ports of Hampton Roads, Baltimore, Philadelphia, and New York.* The following table, taken from the Commission's opinion in this case, is illustrative of the applicable rates from the base origin groups:

To	Distance Miles	Local rates	Proportional rates (1)	(2a)	(2b)
Hampton Roads, Va.	412	$3.98	$3.62	$3.42	$2.97
Baltimore, Md.	241	3.61	3.36	3.15	2.70
Philadelphia, Pa.	315	3.61	3.36	3.22	2.77
New York, N.Y. (upper piers)	388	3.99	3.62	3.62	3.17
New York, N.Y. (lower piers)	379	3.99	3.57	3.57	3.12

Proportional rates (1) to Hampton Roads, Baltimore, and Philadelphia, known as the "inside-the-capes" rates, apply on coal which is destined for delivery by water within the harbor limits, i.e., inside the

* Local rates apply to traffic which has not had a prior and will not have a subsequent movement. Proportional rates apply only when the transportation to which they relate is part of a through movement. In essence, proportional rates are balances of through rates and vary according to the length of the through service.

Virginia or Delaware capes. To New York the proportional rates are the same whether the destination of the coal is beyond or within the harbor limits. These rates are 24 or 25 cents less than the rates to the port locally, or in the case of New York, rates to the so-called upper piers are 37 cents less than the rates to New York locally. The reason for these rates is to enable receivers of coal located on the water front to obtain their fuel at about the same cost as those who have track-delivery facilities and to enable carriers not directly serving certain water front customers to compete with other carriers which serve such consumers by rail. In short, the railroads have reduced their rates to the ports by an amount sufficient to enable a purchaser of coal for delivery by barge to pay the barge charges within the port area and still be on a competitive basis with industries which receive coal in railroad cars.

Proportional rates (2a), known as "outside-the-capes" rates, apply on coal which moves beyond the respective harbor limits via ocean-going vessels or barges. These rates are from 39 to 46 cents less than the local rates to the ports, or in the case of New York, the rates to the so-called lower piers are 42 cents less than the rates to New York locally. The reason for these proportional rates is to permit coal which moves via rail and ocean routes to compete with coal which moves all-rail to the same destination, such as Philadelphia, New York, and points in New England.

The "inside-the-capes" and "outside-the-capes" rates have been in effect for about half a century. They have been sustained by the Commission under Section 2 of the Interstate Commerce Act. *Central Pennsylvania Coal Producers' Association* v. *B. & O. R. Co.,* 196 I.C.C. 203 (1933).

Proportional rates (2b) are of more recent origin, though they have been in effect for nearly 15 years. These rates, which apply on coal which moves via a rail-ocean-rail route to interior destinations in New England, had their genesis in the several proceedings which the railroads have instituted before the Interstate Commerce Commission since 1937 for authority to make general increases in their freight rates. The proceedings which are pertinent here were designated by the Commission as Ex Parte Nos. 115, 162, and 166 (hereinafter sometimes called "the revenue cases"). Proportional rates (2b) are a result of the so-called "single increase rule," which the Interstate Commerce Commission adopted in the revenue cases, and it should be clearly understood what that rule is, why it was adopted, and how it works.

THE REVENUE CASES

In the revenue cases the Commission undertook to distribute the burden of increased costs of rail transportation equitably among shippers of different commodities. At the insistence of shippers and the railroads, the Commission also gave recognition to the fact that in many instances rate and competitive relationships between various localities and commodities were important, and in some instances more important than the level of rates. In authorizing general rate increases, therefore, the Commission undertook to preserve existing rate relationships.

Rail rates on coal are generally established on a group and differential, rather than a distance, basis, and rate relationships between the various producing origins are of vital importance to the coal industry.

Consequently, in prescribing or approving increases in the rates on coal in the revenue cases, the Commission used percentages, or graded increases, subject to maxima, or hold downs. The object of this method of increase was to avoid disruption of existing rate relationships.

New England is one of the most important markets for coal mined in the southern and northern Appalachian fields. Coal moves to this market via all-rail and rail-and-water routes from both producing regions. Thus, there is competition not only between southern and northern coals in the New England market but also between all-rail and rail-and-water routes. The principal competition, however, is between northern coal moving to New England either all-rail or rail-and-water through New York Harbor and southern coal moving rail-and-water through Hampton Roads.

In prescribing or approving general increases in coal rates, the Commission had no difficulty in preserving the rate relationships between all-rail and rail-and-water routes where the coal was destined to a New England port city: it simply permitted the railroads to increase their rates by 90 cents per gross ton in the revenue cases.

Thus on coal moving to, say, New Haven

(1) via all-rail routes from the northern or southern coal fields, the base rates were increased by 90 cents per gross ton, and

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(2) via rail-and-water routes from the northern or southern fields, the base rail rates were increased by 90 cents. The water leg of these routes is either by private carrier or is exempt transportation under Section 303(b) of the Interstate Commerce Act, and the Com-

mission has no authority to prescribe or regulate rates of the water carriers.

THE REASON FOR THE SINGLE INCREASE RULE

The Commission faced a different problem, however, where coal, which had previously moved via a rail-and-water route to a New England port, say, New Haven, subsequently moved from that port via rail to an interior destination in New England, say, Hartford. Here both the railroads handling the coal from the coal fields to a tidewater port and the New Haven Railroad, which hauled the coal from New Haven to Hartford, had justified an increase in their rates. Their respective hauls were separated by private carriage or, in some instances, by contract or common carriage, which was, however, *always* exempt from regulation by the Commission under Section 303(b). If the Commission had permitted each of these railroads to increase its rates by the prescribed or approved percentages, shippers using the rail-and-water routes would have paid a double increase in rail rates on coal as compared with shippers using all-rail routes. This would have given the all-rail routes a competitive advantage over the rail-and-water routes.

To meet this situation the Commission evolved the so-called single increase rule, whereby the increase in rail rates on coal moving rail-ocean-rail from the coal fields to inland destinations in New England was limited to a total of 90 cents. This preserved the rate relationship between all-rail and rail-ocean-rail coal moving to Hartford and other New England destinations. Thus:

(1) the all-rail rates from the northern and southern fields to Hartford were increased by 90 cents per gross ton, and

(2) increases totaling 90 cents per gross ton were permitted in the total of the rail rates from the northern and southern fields to the tidewater ports and the rail rate from New Haven to Hartford.

The single increase rule likewise preserved the existing relationships between rates on coal moving rail-ocean-rail and rail-ocean-barge to Hartford. The total rail rates were increased by the same amount when the coal moved rail-ocean-rail as when it moved rail-ocean-barge to Hartford. A barge line handling coal between New Haven and Hartford was not hurt in any way by the increase in rail rates. It was no worse off than it would have been if the rail rates had not been increased at all.

In short, the single increase rule represents *reductions* in the normal pattern of general increases in rail rates to preserve rate relationships, prevent shippers by rail-water-rail routes from paying double increases, and permit the water carriers to continue to participate in the movement of coal without being hurt in any way by the rail rate increases.

The only alternatives to the single increase rule would have been:

(1) to permit the railroads to increase their charges on both rail legs of the rail-ocean-rail movement by the full percentage increases. This would have imposed on shippers via rail-ocean-rail routes double increases as compared with shippers via all-rail, rail-ocean, and rail-ocean-barge routes. As the result, railroads hauling coal to North Atlantic ports for transshipment by rail-ocean-rail routes would have had to reduce their proportional rates or run the risk of losing coal traffic moving via such routes.

(2) to permit the railroads involved on each rail leg of the rail-ocean-rail movement to take only one-half of the increases authorized on coal generally. This would mean that the railroads hauling coal to a port would have increased their rates on all transshipped coal by only 45 cents per ton, regardless of whether it moved rail-ocean-rail, rail-ocean, or rail-ocean-barge beyond the port. Since only about four percent of the coal moving under transshipment rates through the North Atlantic ports in 1948 had a further rail movement in New England, the railroads would have lost 45 cents per ton, which they urgently needed, on the bulk of their transshipped coal. In 1948, for instance, the revenue loss to railroads on coal moving for transshipment to North Atlantic and Lake Erie ports, to which similar proportional rates are in effect, would have been about $40,000,000. Moreover, the rates on coal for delivery via rail throughout the New England and Middle Atlantic states are related to the railroads' transshipment rates. A reduction in the transshipment rates might have compelled the railroads to reduce their all-rail rates to this territory. Among the important areas affected would have been that which includes Bethlehem, Syracuse, Eastern Pennsylvania, and parts of New Jersey, to which area about 75 million tons of coal moves every year.

In short, the end result of both these alternatives would have been upsetting established relationships and setting in motion competitive pressures which, at best, would have drained off increases in revenues which the Commission had found were urgently needed by the railroads. The only practical way the Commission could fulfill its responsibilities to the railroads under the Declaration of National Transportation Policy and Section 15a of the Act was to adopt the single increase rule.

THE MECHANICS OF THE SINGLE INCREASE RULE

To comply with the single increase rule, the railroads, with the approval of the Commission, adopted a so-called "refund arrangement." Under this plan the railroads transporting coal from the mines to the tidewater ports for transshipment collected the full measure of the increases, or 90 cents per gross ton. If subsequently the coal moved via rail from a tidewater dock in New England, the New England railroads collected from the shipper one-half of the maximum authorized increases, or 45 cents per gross ton. At this point, the shipper would have paid 45 cents per gross ton more than the increases authorized by the Commission. This 45 cents per ton was "refunded" to him upon his certifying to the railroads moving the coal from the mines to the tidewater port that the coal had subsequently moved from a New England port via rail, and that he had consequently paid increases in rail rates in excess of the maximum amounts authorized by the Commission. Obviously, when the coal moved from a tidewater dock in New England via barge or truck the shipper could make no such certification.

Refund arrangements similar to this are not uncommon. One was involved in *Barringer* v. *U.S.*, 319 U.S. 1 (1943).

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of immense importance to the railroad industry and to the administration of the Interstate Commerce Act.

1. ***The MECHLING case should not be extended to strike down the proportional rates involved here. If so extended, it will distort the purpose of Section 2 and***

cast serious doubts on the validity of a large number of proportional rates.

Section 2 of the Act makes it unlawful for a railroad to charge one person more than another for a "like and contemporaneous service in the transportation of a *like* kind of traffic under substantially similar circumstances and conditions." The District Court held that the Commission exceeded its statutory authority in concluding that the assailed rates do not violate that section. It thought that this conclusion was required by *I.C.C.* v. *Mechling*, 330 U.S. 567 (1946). In that case the Commission had fixed a rate for transportation of wheat east by rail from Chicago at a rate higher if it arrived in Chicago by barge than if by rail or lake. It was conceded that the barge lines were "connecting lines," as were the rail and lake carriers, within the meaning of Section 3(4) of the Act, and the Supreme Court held that the application of different proportional rates to connecting lines violated Sections 3(4) and 2 and the Declaration of Policy of the Act. This case came before the District Court, however, on findings by the Commission that the Blue Line is not a connecting line within the meaning of Section 3(4).

The Commission also found that all the Blue Line's transportation of coal between New Haven and other destinations in New England is always beyond the jurisdiction of the Commission under Section 303(b) of the Act. In MECHLING some of the transportation performed by the barge lines was subject to the Commission's jurisdiction, and the Commission found that it was impracticable for the barge lines to maintain different rates on exempt and nonexempt transportation.* In short, in MECHLING there were barge

* In MECHLING the Commission found: "The Federal Barge Line serving Kansas City and the Mechling Barge Line serving the

routes and rates over which the Commission, as a practical matter, had full control. Here the Commission has no more control over any part of the Blue Line's operations out of New Haven than it would have if the Blue Line conducted a collateral operation up the Yangtze River.

The Declaration of National Transportation Policy requires the Commission to provide for fair and impartial regulation of "all modes of transportation" subject to the Act, so administered as to "preserve the inherent advantages of each." The words are "modes of transportation" subject to the Act, not "carriers subject to the Act." The "mode of transportation" involved in this case, i.e., bulk transportation not subject to regulation by the Commission, is not a "mode of transportation" subject to the Act. Moreover, the Declaration imposes upon the Commission duties to railroads as well as water carriers. In the revenue cases the Commission was faced with the immediate and serious problem of providing, as it is required to do by Section 15(a) of the Act, adequate earnings for railroads which are subject to its regulation. Obviously, it would have been handicapped in performing those duties and will be handicapped in the future in performing similar duties, if it is required to look out for the welfare of a mode of water transportation which it is powerless to regulate to the extent of permitting unregulated barge lines to participate in increases in rail rates.

The District Court not only brushed aside these differences as immaterial, but also disregarded the sub-

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Illinois origins are common carriers, and their port-to-port rates are on file with us. Such rates are subject to our jurisdiction, except those of Mechling in instances where not more than three kinds of grain are transported in a given tow. However, Mechling has found it impracticable to maintain different rates on the exempt and non-exempt traffic." (262 I.C.C. at 19)

stantially different economic backgrounds in the two cases. In MECHLING, there was a deliberate attempt to deprive the barge lines of participation in proportional rates which they had enjoyed since barges returned to the inland waterways in 1933. The admitted design of the railroads was to drive traffic off the barges and onto the rails. The Supreme Court viewed this as a scheme to deprive shippers of what it considered to be cheap water transportation. Here nothing has been done which hurts the Blue Line or shippers of coal over the Blue Line. They have been left in precisely the same position that they would have been in if the Commission had not authorized any general increases in the railroads' rates in the revenue cases. It is just as inviting for shippers to use rail-ocean-barge routes today as it was before the rail-ocean-rail proportional rates were put into effect.

Indeed, the Blue Line's complaint is not that it is in any worse position than it would have been in if the railroads had not increased their rates but that it has not been permitted to participate in the railroads' rate increases which the Commission authorized. The inequity of this complaint is obvious, because the Pocahontas lines have been able to increase their proportional rates by only 28% since 1936, whereas the Blue Line over that period has increased its rates for transporting coal from New Haven to Hartford by 87%.

What the District Court has done in this case is to strike down proportional rates which it regarded as discriminatory against water transportation without analyzing and giving weight to the compelling reasons which led the Commission to adopt the single increase rule and approve such proportional rates. To reach this result, the District Court extended Section 2 to a situation which it simply was not designed to cover.

Section 2 was enacted more than half a century before Congress enacted the Transportation Act of 1940, which gave the Commission authority to regulate water carriers. Section 2 is primarily directed to discrimination between shippers in the same locality. Its purpose is to put such shippers on an equal footing, so far as freight rates are concerned. While Section 2 must be construed in the light of the new policy made effective by the Transportation Act of 1940, it cannot be converted into a vehicle for striking down the proportional rates involved in this case without distorting its purpose and casting grave doubts on the validity of a large number of proportional rates which have been held to be valid under Section 2 and which are tightly woven into the fabric of the Nation's railroad rate structure.

It is common practice for the railroads to publish and maintain proportional rates, the application of which depends upon the origin or destination of traffic. For instance, more than 100 million tons of bituminous coal move annually on such rates. Grain moving from the West to the East moves on proportional rates which vary according to where the grain originates. Packing house products move to various eastern ports on proportional rates which vary depending upon whether such products are destined to points in the United Kingdom or Europe or to points in other foreign countries. To the Gulf ports class and commodity rates are published which differ in their application, depending upon whether the traffic is exported to destinations in Europe, South Africa, eastern ports of South America, or to ports of destination in other countries. The District Court's decision, which at least casts a cloud on the validity of these rates, deserves full hearing and briefing before the Supreme Court.

2. *The District Court's decision is based on an improper construction of Section 2 which deprives the Commission of its authority to determine what is "like and contemporaneous service," what is "like kind of transportation," and what circumstances and conditions are "substantially similar."*

The District Court quoted from other cases to the effect that Section 2 does not allow railroads to make a difference in rates because of differences in circumstances arising either before the services of the carrier began or after they were terminated. None of the cases from which those quotations are taken, however, outlaws proportional rates. The Interstate Commerce Act specifically refers to proportional rates. 49 U.S.C.A. Secs. 1(4), 6(1), 6(11)(b), 15(1). As this Court said in *I.C.C.* v. *Inland Waterways Corp.*, 319 U.S. 671, 684-85 (1943):

> "Proportional rates so differing and lower than local rates for like outbound transportation have a long history, antedating the Interstate Commerce Act itself. Long hauls have generally been thought entitled to move at a rate less than the sum of the rates for local or short hauls between intermediate points. The practice of routing commodities such as grain to centers for marketing and processing has been widespread and often a necessary feature of the process of distribution. In many instances stopovers for marketing and processing have not been considered as disrupting the continuity of transportation to more distant points, and consequently the grain has been allowed to move on at a rate lower than the outbound rate on grain originating locally and not from a distance. To get the outbound business competing carriers frequently would offer rates similarly computed. Proportional rates established on this reasoning have become deeply embedded in the transportation system of the country, and have

been approved by the Interstate Commerce Commission, by the federal courts, this one included; and, so far as it has spoken on the subject, by Congress itself. We see no reason for repudiating them now."

The late Commissioner Eastman has justified proportional rates on the grounds:

First, even though the shipments to which the two kinds of rates apply are the same in content, the dissimilarity in their origins or destinations and in commercial and competitive conditions prevents them from being a "like kind of traffic" within the meaning of Section 2.

Second, there is a fundamental dissimilarity in the attendant "circumstances and conditions" as between local traffic and traffic which is being transported part of the way from an origin or to a destination which lies beyond, and this dissimilarity is not extraneous to the transportation service rendered but is incident thereto.

See Commissioner Eastman dissenting in *Grain Proportionals, Ex-barge to Official Territory,* 248 I.C.C. 307, 317 (1941).

Once it is conceded that the railroads may take into account the origin or destination of traffic in fixing their rates the question arises as to what is the point of origin or destination *for that purpose.* It is clear, we submit, that in fixing proportional rates or rates in the nature of proportional rates, the railroads are not required by Section 2 to take into account all the transportation, including private transportation, involved in moving a product from the point of production to the point of ultimate consumption. The railroads are entitled to draw the line in a practical way and determine for themselves how much of the total transportation,

private or public, they will consider in fixing their own rates. There are, of course, limitations on this discretion of the railroads, but they are not limitations imposed by Section 2. They are limitations imposed by other provisions of the Act, such as the Declaration of Policy that the Act shall be so administered as to preserve the inherent advantages of all modes of transportation subject to the Act, and the requirement of Section 3(4) that railroads shall not discriminate in their rates, fares and charges between connecting lines.

An example taken from the handling of grain shipments will illustrate our point. Grain is shipped into transit points in cars loaded with, for instance, 120,000 pounds of grain. There it is unloaded, processed and shipped out partly by rail and partly by truck. The rail movement out of the transit point may be covered either by a carload rate with a minimum weight of, for instance, 60,000 pounds, or a less-than-carload rate. In fixing their charges, the railroads may and do treat that part of the carload which has a subsequent movement by rail as moving to the point of ultimate delivery, while at the same time, they may and do treat that part of the carload which moves out of the transit point by truck as having stopped at the transit point.

T. A. D. Jones purchases coal in carload lots at the southern coal fields, has it shipped to Hampton Roads, where it is loaded into colliers. These colliers carry approximately 10,000 tons of coal. When the colliers reach New Haven, they are unloaded onto T. A. D. Jones' tidewater dock. The bulk is broken. Some of the coal moves from the dock by rail, some by truck and some by barge. Only the subsequent rail movement is subject to regulation by the Commission. Appellants contend that they are entitled to treat all of the coal as stopping at New Haven except that part thereof

which has a further rail movement, and they may take into account such further rail movement in determining their proportional rates for the through movement.

3. *The District Court's decision deprives the Commission of its authority to look through form to substance and conclude that no different "rates" are charged on rail-ocean-barge and rail-ocean-rail traffic.*

It is well-established that the Commission may look through form to substance in determining whether there has been a violation of the Act. As the Supreme Court said in *Barringer & Co.* v. *U.S.*, 319 U.S. 1, 7, 8 (1943):

> "In considering the circumstances and conditions attending the transportation service, the Commission was not required to ignore the fact that the loading charges, although separately stated in the tariffs, are in each case a component part of the total line-haul cost to the shipper and inseparable from it.
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> * * * * *
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> "Whether made in the one charge or the other, it (the loading charge) enters into the total cost of the line haul to the shipper, regardless of whether the loading charge be separately stated or included in the line-haul tariff. Since the only effect on the shipper is in the difference in the line-haul charge and he is harmed no more by one method of effecting that difference than the other, any conditions attending the line haul which justify the one as nondiscriminatory equally justify the other."

Moreover, the Supreme Court stated in *Power Commission* v. *Hope Gas Company*, 320 U.S. 591, 602 (1944):

> "It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable,

> judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."

In the case of a shipment of coal which moves rail-ocean-rail, there is every reason to make the refund which is made, because the shipper has paid a general increase of 45 cents more than the Commission has authorized. It is this overpayment which is refunded. But in a shipment by rail-ocean-barge there is no such overpayment. The shipper simply pays the single increase of 90 cents, the same amount which the other shipper has paid, after taking the refund into account, and there is, therefore, nothing to refund.

The Commission properly recognized that the refund arrangement in substance does not create different rates from the Pocahontas mines on rail-ocean-rail and rail-ocean-barge coal but effects a division of the general increases totaling 90 cents between the Pocahontas lines and New England railroads where the latter participate in the movement. The mechanics of the single increase rule should not obscure the fact that the rates of the Pocahontas lines under attack are in ultimate effect—both legal and economic—precisely the same for both rail-ocean-rail and rail-ocean-barge movements. If this be so, there can be no basis for the charge of discrimination or undue preference under any section of the Act.

In the revenue cases the Commission has consistently recognized the divisional nature of the single increase rule. It has permitted the railroads to increase their rates by the same amount whether or not one or two railroads were involved in the haul and whether or not a water movement precedes, separates, or follows two rail hauls. As a matter of fact, at one time the railroads, with the Commission's permission, put the single

increase rule into effect by a divisional rather than a refund arrangement. Thus, when coal moved over the Pocahontas lines and thence to a New England destination by ocean and rail movement the Pocahontas lines collected the full measure of the increase and divided the increase directly with the New England railroad involved.

The divisional nature of the refund arrangement is further indicated by the fact that in several of the revenue cases the entire increase was given over to the New England lines participating in the rail-ocean-rail movement, the Pocahontas lines and other railroads hauling coal from the coal fields to North Atlantic ports receiving nothing. Moreover, at present the New England lines get one-half of the 90-cent increase in rates, although their haul is only about 35 to 40 miles compared to a haul of over 400 miles from the southern coal mines to Hampton Roads. The long standing revenue difficulties of the New England lines were recognized in the *New England Divisions* case, 261 U.S. 184 (1923), where the validity of the Commission's order increasing the divisions or shares of the New England roads in through freight rates was upheld.

The decision of the District Court in setting aside the Commission's order deprived the Commission of its right— in fact, its duty—to look through form to substance and see in this case a division of increases in rail charges in a through movement of coal from the coal fields to interior destinations in New England, designed to take care of the proved revenue needs of the railroads without in any way upsetting existing relationships of rail and water routes. The District Court, however, failed to analyze the problem which confronted the Commission and thus decided the case on the basis of form rather than substance and upon what

was no more than a superficial resemblence to MECHLING.

4. *The District Court's decision is contrary to the BARRINGER case.*

In *Barringer & Co.* v. *U.S.*, 319 U.S. 1 (1943), the railroads carrying cotton from points in Oklahoma to points on the Gulf of Mexico published rates under which cotton was typically collected in less-than-carload quantities at ginning points, carried by rail for short distances to compressors, and after compressing, assembled in carload quantities for shipment to destination. The shipper paid the local, less-than-carload, rate to the compress point, and the local rate from the compress point to destination, but on the cotton's arrival at destination the carriers refunded the difference between the freight paid and the through, carload, rate from point of origin to destination. But in those instances where cotton moved to a compress point by rail and out of such point by truck, the carriers by their tariffs retained the less-than-carload rate to the compress point. In short, the railroads adjusted their rates to the compress points, depending upon the destination to which the cotton moved from the compress points and whether or not it moved by rail. If the rate structure involved in BARRINGER is lawful, the decision of the District Court in this case is necessarily wrong.

5. *None of the appellees was entitled to invoke Section 2 before the District Court.*

The Commission found that there were no parties subject to unjust discrimination under Section 2. The District Court said:

> "We do not accept the finding of the Commission that 'there are no parties subjected to unjust

discrimination or undue prejudice as the complaining and intervening operator-dealers forward coal and the complaining and intervening public utilities receive coal, by both rail and barge, and are accorded the same proportional rates and refunds.' Such a finding seems to us clearly erroneous and not supported by any substantial evidence.

"However, quite apart from this, we hold that the rates complained of are unlawful because in violation of Section 2 of the Interstate Commerce Act (49 U.S.C. 2)."

This last-quoted sentence is surprising, if it means—as it seems to mean—that a District Court can strike down an order of the Commission without finding that somebody is injured. If the sentence means that, it is obviously erroneous. District Courts have no power to correct discrimination "in the air."

Moreover, the District Court's conclusion that the Commission's finding is not supported by substantial evidence is not correct. Only shippers have standing to invoke Section 2. *Barringer & Co.* v. *U. S.*, 319 U.S. 1, 13 (1943); *Williams* v. *Terminal Co.*, 315 U.S. 386, 408 (1942). The only shippers involved in this case are T. A. D. Jones & Co. and Wyatt, Inc., coal dealers who operate tidewater docks at New Haven. Both ship coal by rail and barge to interior New England destinations, and the assailed proportional rates do not place either at a competitive disadvantage with the other or, so far as the record shows, with any other competitor or with any other coal dealer in New England. They have not pointed to any other shipper who can or does avail himself of any proportional rate which is not available to them.

Moreover, a difference in rates can be unjustly discriminatory only where it produces injury, and the evidence clearly shows that neither of these parties is

injured by the alleged difference in rates complained of. In fact, they benefit by the rail-ocean-rail proportionals and concede that they would be injured if such rates were cancelled.

The two customers of Jones or Wyatt mentioned in the record are United Illuminating Company and Hartford Electric Light Company. United Illuminating Company has a plant at New Haven. It is not equipped to receive coal by rail and receives coal solely by barge. Hartford Electric Light Company has facilities for receiving coal both by barge and by railroad car, but its capacity for receiving coal by railroad car is limited to 25 to 30% of its capacity. The record shows, however, that for the year 1948, the last year for which records were available at the time of the hearing, Hartford Electric had received and was receiving coal all-rail from the northern Appalachian coal fields to meet about 25% of its coal requirements. It received the rest by barge. There is no evidence that either Jones or Wyatt had ever delivered a single pound of coal to Hartford Electric by rail from New Haven.

So far as Jones and Wyatt are concerned, they have not shown that the proportional rates applicable to rail-ocean-rail shipments have been attractive enough to induce them to take a single pound of coal off the barges and put it onto the rails. The evidence indicates that whenever Jones and Wyatt can reach a customer by barge they do so despite the allegedly discriminatory proportional rates applicable to rail-ocean-rail coal. Therefore, as to points which can be served either by barge or rail, the rail-ocean-rail proportional rates are simply "paper" rates. Such "paper" rates cannot result in unjust discrimination.

In short, the District Court eliminated from consideration any section other than Section 2. There were

no parties before the Court who were entitled to invoke that section, and the Court's action in setting aside the Commission's order because of discrimination "in the air" is plainly erroneous.

The questions presented in this appeal are substantial, are obviously of public importance, and cannot be disposed of on an examination of the appeal papers. Probable jurisdiction should, therefore, be noted, and the cause set down for argument.

Respectfully submitted,

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January 8, 1952.

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MCWILLIAMS BLUE LINE, INC., T.A.D. JONES & CO., INC., WYATT, INC., THE HARTFORD ELECTRIC LIGHT CO., AND THE UNITED ILLUMINATING COMPANY, PLAINTIFFS,

against

THE UNITED STATES OF AMERICA, et al., DEFENDANTS.

Civil 65-270

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Of Counsel.

Before SWAN, Circuit Judge, and RYAN and SAMUEL H. KAUFMAN, District Judges.

RYAN, D. J.:

This suit is filed under Sections 1336, 1398, 2321, 2322 and 2323 of the United States Code, Title 28, which provide for suits to enjoin, set aside, annul and suspend orders of the Interstate Commerce Commission. It came on to be heard before a specially constituted court, pursuant to the provisions of Title 28, Sections 2284, and 2321-2326, U.S.C. The complaint prays judgment setting aside, and enjoining enforcement, of an

order of the Commission, entered June 5, 1950 [1], which, by a six-to-five vote of the Commission, dismissed the complaint in a proceeding before it, Docket No. 30122, *James McWilliams Blue Line, Inc. et al. v. Campbell's Creek Railroad Company, et al.*, 278 I.C.C. 312.

No material issue of fact has been raised by the pleadings.

We find that this Court has jurisdiction of the subject matter of this suit, that the amount in controversy exceeds the sum of $3,000 exclusive of interest and costs, and that venue is properly laid because plaintiff "Blue Line" has its principal office within this district. 28 U.S.C. 1398.

The complaint before the Commission assailed rates and practices affecting the transportation of rail-ocean-barge coal, by the so-called Pocahontas [2] Railroads from mines in Virginia, West Virginia and Kentucky to Hampton Roads ports, which coal is subsequently moved by ocean to New England ports and thence by barge to interior ports. The rates, which are proportional rates, are 45 cents per ton higher than proportional rates on like coal which is moved by ocean to New England ports, and thence by rail (rail-ocean-rail coal).

In the proceeding before the Commission, the com-

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[1] The order of the Commission was issued on June 5, 1950; however, by a second order of January 8, 1951, the Commission denied the plaintiffs' petition for reconsideration and reargument.

[2] The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, and The Virginia Railway Company.

In addition to these three "Pocahontas" lines, because they participate in transporting coal from various mines, the following were named as defendants before the Commission: Campbell's Creek Railroad Company, The Kanawka Central Railway Company, Kanawka Glen Jean and Eastern Railroad Company, Kelly's Creek and North Western Railroad Company, Kelly's Creek Railroad Company, The New York Central Railroad Company and Winifrede Railroad Company.

plainants (plaintiffs herein) contended that the rates so established are unlawful and in violation of the provisions of Sections 2, 3(1) and 3(4) of the Interstate Commerce Act [3], particularly when read in light of the National Transportation Policy as set forth in the Transportation Act of 1940, which amended the Interstate Commerce Act (49 U.S.C. notes preceding Sections 1, 301, 901 and 1001). [4]

We have concluded that the order of the Commission dismissing the complaint filed before it by the plaintiffs herein was erroneous, that the rates complained of are discriminatory and unlawful, and that the continued

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[3] Section 2 (49 U.S.C. 2) declares it is unlawful to charge one person more than another for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

Section 3(1) (49 U.S.C. 3(1)) declares unlawful "any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever" or to subject any of the above "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 3(4) (49 U.S.C. 3(4)) provides that rail carriers "shall not discriminate in their rates, fares, and charges between connecting lines * * *. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to Part III."

[4] The National Transportation Policy is set forth in the Transportation Act of 1940, which amended the Interstate Commerce Act (49 U.S.C. notes preceding Sections 1, 301, 901 and 1001); that policy expresses the Congressional mandate that "All of the provisions of this Act shall be administered and enforced with a view to carrying out" the policy there expressed. The policy goes on to state that it is the will of Congress "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; * * * to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

establishment and enforcement of those rates must be enjoined.

Plaintiff, James McWilliams Blue Line, Inc. ("Blue Line") is a New Jersey corporation, with its principal office at No. 1 Broadway, New York, N. Y. "Blue Line" is a common carrier by water in interstate commerce; it holds a certificate of convenience and necessity, issued to it by the Commission pursuant to Section 309 of the Interstate Commerce Act (49 U.S.C. 909), to engage, subject to said Act, as a common carrier by water in the interstate transportation of commodities generally by water. "Blue Line" is in competition with the New York, New Haven and Hartford Railroad for the movement of coal from New Haven to ultimate destinations in New England.

Plaintiffs T. A. D. Jones & Co., Inc., and Wyatt, Inc., are Connecticut corporations with their principal offices at New Haven, Connecticut. They are engaged in buying and selling coal; each has at New Haven yards, docks and facilities which enable it to receive and transship coal for transportation to points beyond either by water or by rail. Both sell and ship coal to customers throughout New England; included among their customers are plaintiffs, the Hartford Electric Light Co. and United Illuminating Company, public service utility companies of Connecticut, which in their production and sale of electric energy use large quantities of coal.

United States of America, named as defendant, joins in the prayer of the plaintiffs and asks that the relief sought in the complaint be granted.

The Pocahontas railroads and a group of northern railroads were, on their petitions, granted permission

to intervene in this suit.[5] The answers of the railroads, while putting in issue no material allegation of the complaint, do assert the legality of the assailed rates and ask for a dismissal of the complaint.

The controversy before us had its genesis in petitions filed by the railroads with the Commission at various times since 1937 asking for authority to make general increases in their freight rates.[6] As an outgrowth of these ex parte proceedings, the Commission adopted and applied the "single increase rule" and used percentages, or graded increases, subject to maxima, or hold-downs. The Commission permitted the railroads to increase their rates by 90 cents per gross ton on coal destined for routing through a New England port city, and irrespective of whether the coal moved via a rail-ocean-rail route or via a rail-ocean-barge route. Such an increase would, of course, apply to coal moving through New Haven to a point of ultimate destination

[5] The Northern railroads were also granted permission to intervene in the proceedings before the Commission. They are:

The Baltimore and Ohio Railroad Company, Boston and Maine Railroad, The Central Railroad Company of New Jersey, Central Railroad Company of Pennsylvania, The Delaware and Hudson Railroad Corporation, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Lehigh and New England Railroad Company, Lehigh Valley Railroad Company, Maine Central Railroad Company, The Monongahela Railway Company, Montour Railroad Company, the New York, New Haven and Hartford Railroad Company, New York, Ontario and Western Railway Company, New York, Susquehanna & Western Railroad Company, The Pennsylvania Railroad Company, The Pittsburgh & Shawmut Railroad Company, The Pittsburgh and Lake Erie Railroad Company, Reading Company, Western Maryland Railway Company.

[6] The proceedings which are pertinent here were designated by the Commission as Ex Parte 115. (General Commodity Rate Increases, 1927, 223 I.C.C. 657, 229 I.C.C. 435), No. 162 (Increased Railway Rates, Fares, and Charges, 1946, 266 I.C.C. 537; 268 I.C.C. 169; 269 I.C.C. 418; 269 I.C.C. 418; 273 I.C.C. 445; 274 I.C.C. 168; and No. 163 (Increased Freight Rates, 1947, 269 I.C.C. 33; 270 I.C.C. 81, 270 I.C.C. 93; 270 I.C.C. 403).

in New England from either the northern or southern coal fields. In application, the increase granted was restricted to, and divided among, the railroads involved. The factual situation which resulted is shown by taking the rate of $3.42 per gross ton, which, at the time of the complaint, was published by the Pocahontas railroads as their initial charge for transporting coal from certain mines to the Hampton Roads ports. This rate was collected in the first instance by the Pocahontas roads on all coal transported to Hampton Roads and destined to New Haven. The tariffs provided, however, that if the coal was subsequently moved by railroad from a New England port to the point of ultimate destination, the Pocahontas roads, upon receipt of certification to that effect, would refund 45 cents per ton, leaving them a net charge for their transportation from mines to Hampton Roads of $2.97 per ton. No refund is provided, however, if the coal was subsequently moved from a New England port to the same destination by water carrier. There was created a differential in charges for the rail transportation service from the mines to Hampton Roads ports dependent not upon any difference in rail service, but solely upon the method of subsequent movement to ultimate destination.

Before the Commission, the Pocahontas railroads conceded that it does not cost them any more to transport coal from the mines to Hampton Roads when such coal reaches its final destination in New England by barge than when it reaches its final destination by rail. The services they furnish to shippers are the same in each instance.

A large part of the coal dealt in by Jones & Co. and Wyatt, and purchased and used by Hartford Electric and United Illuminating, consists of bituminous coal originating at mines in the Pocahontas District. This

coal is transported by the Pocahontas railroads by rail from the mines to the Hampton Roads ports. Thence, it is carried by ocean carriers to the New Haven docks of Jones & Co. and of Wyatt, from whence it is transshipped for movement to points of ultimate delivery in New England. The receipt and further shipment of coal by them by water is cheaper and more economical than by rail, and they have established facilities representing substantial investments designed to handle coal by water.

We do not accept the finding of the Commission that "there are no parties subjected to unjust discrimination or undue prejudice as the complaining and intervening operator-dealers forward coal and the complaining and intervening public utilities receive coal, by both rail and barge, and are accorded the same proportional rates and refunds." [7] Such a finding seems to us clearly erroneous and not supported by any substantial evidence.[8]

However, quite apart from this, we hold that the rates complained of are unlawful because in violation of Section 2 of the Interstate Commerce Act (49 U.S.C. 2). We find it unnecessary, therefore, to determine the legality of these rates under Sections 3(1) and 3(4) of the Act.

We are unable to distinguish the instant case from *I.C.C.* v. *Mechling,* (1946), 330 U.S. 567. There the order of the Commission permitted the railroads to charge higher reshipment rates (3 cents per 100 lbs.) east from Chicago for grain brought to Chicago by barge than for ex-lake or ex-rail grain. The enforce-

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[7] Report of Commission, June 5, 1950, Sheet 10.

[8] *cf. Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, *N.L.R.B.* v. *Universal Camera Corporation*, C.A. 2d Cir., Docket No. 21395, decided July 13, 1951.

ment of the order was enjoined to the extent that it permitted this extra charge.

The only factual difference between the *Mechling* case and the case at bar is that in the *Mechling* case the rates charged for rail transportation were dependent upon the means used to accomplish the prior movement of the shipment, while here the rates are made dependent upon the means used to accomplish the subsequent movement of the shipment. This difference is of no moment. It has been settled with respect to the provisions of Section 2 of the Act prohibiting different charges by a common carrier for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" that "* * * the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated."[9]

In *Wight* v. *United States* (1896), 167 U.S. 512, Mr. Justice Brewer wrote of this section:

> "The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another." (p. 517)

And further that:

> "It was the purpose of the section to enforce equality between shippers, and it prohibits any

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[9] *Interstate Commerce Com.* v. *Delaware, L. & W. R. Co.* (1910), 220 U.S. 235, 253-254.

> rebate or other device by which two shippers, shiping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor." (p. 518)

Nor are we impressed by the attempt of the Commission to distinguish this case from the *Mechling* case because the Commission cannot regulate "Blue Line's" barge rates. That was true, at least as to part of the ex-barge grain in the *Mechling* case; however, as we read the *Mechling* case, the decision was not based upon the existence of jurisdiction in the Commission to regulate the barge rates on the grain traffic and was reached quite independently of such jurisdiction.

Of the objection, that dire consequences will follow a reversal of the Commission's order and the consequent disruption of the rate structure, we note that of a similar contention made by the Commission in the *Mechling* case, it was said that

> "The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress. See United States v. Chicago, M. & St. P.R. Co., 294 U.S. 499, 506-510." (I.C.C. v. Mechling, supra, p. 580)

The relief prayed for by the plaintiffs must be granted and a judgment may be submitted on notice providing that the order of the Commission of June 5, 1950, dismissing the complaint before it be vacated and set aside, directing the Commission to make and enter an appropriate order ending the practice complained

of and enjoining the Commission from further continuing and enforcing the practices and rates now in effect.

THOMAS W. SWAN
SYLVESTER J. RYAN
SAMUEL H. KAUFMAN

September 24th, 1951.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
ORDER AND JUDGMENT

Civil 65-270

JAMES MCWILLIAMS BLUE LINE, INC., T. A. D. JONES & CO., INC., WYATT, INC., THE HARTFORD ELECTRIC LIGHT CO., AND THE UNITED ILLUMINATING COMPANY, PLAINTIFFS,

against

THE UNITED STATES OF AMERICA, et al., DEFENDANTS.

This cause having been duly and properly submitted and a court of three judges consisting of the undersigned having been duly convened pursuant to the provisions of Title 28, United States Code, Section 2284, to hear this cause, and this cause having on due notice come on for hearing before this court upon the complaint of the plaintiffs and the answers of the defendants, and the evidence before the Interstate Commerce Commission having been submitted to and considered by this court, and counsel for the parties having been heard on oral argument and brief, and the cause then having been taken under advisement by this court, and this court having concluded, found and determined, for the reasons set forth in the opinion filed by it herein on September 24, 1951, that the order of the Interstate Commerce Commission made and entered on June 5, 1950, in its Docket No. 30122, *James McWilliams Blue Line, Inc., et al.* v. *Campbell's Creek R. R. Co., et al.*, should be vacated and set aside; and that said Commission be directed to make and enter an appropriate order ending the practice complained of, and that the Commission should be enjoined from further continu-

ing and enforcing the practices and rates now in effect, it is

ORDERED, ADJUDGED AND DECREED

1. That the order of the Interstate Commerce Commission dated June 5, 1950 in the proceeding before the Commission on the complaint of James McWilliams Blue Line, Inc., and others, Docket No. 30122 on the Commission's Docket, said proceeding being entitled James McWilliams Blue Line, Inc., et al. v. Campbell's Creek Railroad Company, et al., dismissing the complaint be and it is hereby vacated and set aside.

2. That the Interstate Commerce Commission shall make and enter an appropriate order which shall order the railroads, defendants in said proceeding, to cease and desist from continuing the practices and rates found by the Court in its decision herein to be in violation of Section 2 of the Interstate Commerce Act.

3. That the Interstate Commerce Commission be and is hereby enjoined from further continuing and enforcing the practices and rates found by the Court in its decision herein to be in violation of Section 2 of the Interstate Commerce Act.

This 8th day of November, 1951.

THOMAS W. SWAN
United States Circuit Judge
SYLVESTER J. RYAN
United States District Judge
SAMUEL H. KAUFMAN
United States District Judge

Judgment entered:
William V. Connell
Clerk
November 9, 1951.

APPENDIX "B"

The pertinent provisions of the Interstate Commerce Act are as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (Section 1, Act of September 18, 1940, c. 722, 54 Stat. 898, 899; 49 U.S.C., notes preceding Sections 1, 301 and 901.)

Section 2 of Part I of the Interstate Commerce Act:

Sec. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or prop-

erty, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U.S.C. 2)

Section 15a of Part I of the Interstate Commerce Act:

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (49 U.S.C. 15a)

Section 303(b) of Part III of the Interstate Commerce Act:

(b) Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count.

For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this chapter takes effect, to the provisions of sections 843-848 of Title 46. (49 U.S.C. 903(b))

Service of the foregoing statement as to jurisdiction and receipt of copy thereof are hereby acknowledged this 8th day of January, 1952.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 579

INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

JAMES McWILLIAMS BLUE LINE, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM AND STATEMENT OPPOSING JURISDICTION

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ROBERT W. KNOX,
Counsel for Appellees.

LORD, DAY & LORD,
KNOX, MATTHEWS & LISHMAN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 579

INTERSTATE COMMERCE COMMISSION, THE CHESAPEAKE AND OHIO RAILROAD COMPANY, ET AL.,

Appellants,

vs.

JAMES McWILLIAMS BLUE LINE, INC., T. A. D. JONES & CO., INC., WYATT, INC., THE HARTFORD ELECTRIC LIGHT CO., AND THE UNITED ILLUMINATING COMPANY,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

These appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court, move that the decree of the District Court be affirmed.

Statement

This is a direct appeal from the final decree dated November 9, 1951 of a specially constituted District Court of three judges, convened pursuant to the provisions of Title 28, United States Code, Section 2284, to hear and decide an

action brought by appellees in the United States District Court for the Southern District of New York entitled *James McWilliams Blue Line, Inc., et al.* v. *The United States of America, et al., Civil* No. 65-270. By their complaint appellees sought a decree of the court enjoining and setting aside a decision and order of the Interstate Commerce Commission in a proceeding entitled *James McWilliams Blue Line, Inc., et al.* v. *Campbell's Creek R.R. Co., et al.*, 278 I.C.C 312, Docket No. 30122 on the Commission's docket. The United States was named as defendant as provided by the statute but filed an answer admitting the allegations of appellees' complaint and praying that the Commission's order be set aside as erroneous, arbitrary, unsupported by substantial evidence and contrary to law. The Interstate Commerce Commission, the railroads named as defendants in the proceeding before it and railroads which had intervened therein intervened in the court below in defense of the Commission's decision and order.

The three-judge court upheld the contentions of the appellees and the United States, and by the decree which is here appealed from set aside and enjoined the decision and order of the Commission and directed the Commission to enter an appropriate order in accordance with the court's conclusions. The opinion of the three-judge court is reported at 100 F. Supp. 66.

The appeal from the decree of the District Court was allowed on January 8, 1952 and the appeal papers were served upon counsel for appellees on that day.

The proceedings before the Commission were upon the complaint of these appellees alleging that the railroads engaged in transporting coal from mines to the Hampton Roads ports violated Section 1, 2, and 3[1] of the Interstate

[1] For convenience, the pertinent portions of these provisions are reproduced in the appendix hereto.

Commerce Act when they demanded and charged higher rates for such transportation if the coal after being transported from Hampton Roads to a New England port, thereafter was moved from the New England port to point of ultimate delivery in New England by plaintiff James McWilliams Blue Line, a water carrier, or by some other barge carrier, than the rates charged by these railroads for the identical rail transportation from mines to Hampton Roads if the coal subsequently moved from the New England port to point of ultimate delivery by railroad.

Appellees contended before the Commission, among other things, that the determination of their complaint was controlled by the decision of this Court in *I.C.C.* v. *Mechling*, 330 U.S. 567 (1946), in which this Court held that railroads violated the Interstate Commerce Act when they charged higher rates for transporting freight which had had a prior movement by water than the rates charged by them for the same transportation if the prior movement was by a railroad. Appellees urged upon the Commission that the only difference between the *Mechling* case and theirs was that in the *Mechling* case the water movement preceded and here it followed the rail transportation for which the different charges were demanded. And appellees argued that this factual difference made no difference in the application and effect of the provisions of the statute. The majority of the Commission, however, declined to follow the *Mechling* case and with five Commissioners dissenting found that the rates and practices complained of were lawful and dismissed appellees' complaint.

Appellees then instituted this action against the United States to review and set aside the Commission's decision and order of dismissal.

The three-judge court below ruled that the decisions of this Court in the *Mechling* case and in other earlier cases were controlling here. Without considering whether Sec-

tions 1 and 3 of the Interstate Commerce Act were violated, the court held that the rate practices complained of violated Section 2 of that Act forbidding the demanding of a higher rate from one person than charged to any other person "for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."[2]

By its decree the court below vacated and set aside the Commission's order dismissing appellees' complaint and directed the Commission to make and enter an order requiring the railroads concerned to cease and desist from continuing the rates and practices found by the court to be in violation of Section 2 and enjoined the Commission from further continuing and enforcing such practices.

It is from this order that appeal is taken by the interveners below, the Commission and the intervening railroads. The United States has not joined in the appeal.

Appellee Blue Line, like the Mechling Barge Line, is a water carrier engaged, among other things, in moving coal by barge from New Haven, Conn. to points of ultimate delivery in New England, such as Hartford. It is in competition for this traffic with the New Haven Railroad, and naturally, the higher freight rates demanded of shippers for transporting coal from mines to Hampton Roads if they use Blue Line's services than if they forward their coal by railroad are a serious competitive obstacle which offsets the advantage to shippers of the cheaper costs of water transportation.

Appellees T. A. D. Jones & Co. and Wyatt, Inc. are coal dealers with yards at New Haven, Conn., located and with equipment designed for the forwarding of coal to points of

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[2] Here, of course, the service, traffic, circumstances and conditions in so far as related to the transportation of coal from mines to Hampton Roads for which different rates were charged, were not only "like" and "substantially similar", but they were identical.

ultimate delivery by barges or other water carriers. They also have rail sidings and can and do ship coal by rail, but they can do so only by incurring somewhat greater labor expense for handling and by leaving idle their installations for transferring coal to barges. They buy coal at mines in Virginia, West Virgina and Kentucky, cause it to be shipped by railroad to the Hampton Roads ports and transshipped from there by coastwise ships to New Haven. From there they forward the coal to purchasers at points of ultimate delivery in the interior. Among such purchasers are appellees Hartford Electric Light Co. and United Illuminating Company, which have plants designed for the receipt of coal by water.

The only railroads named as defendants in appellees' complaint to the Commission were the railroads engaged in transporting the coal from mines to the Hampton Roads ports.

Numerous northern railroads intervened in the proceeding, claiming that the removal of the discrimination sought by the complaint would lead to disruption of their rates from other mines to northern ports and destinations.

All of the appellees desire to have coal moved from New Haven to ultimate destination by barge but are penalized for so doing by the action of the defendant railroads in demanding rates for transporting the coal from mines to Hampton Roads if the final movement is by barge, which are 45 cents per ton higher than the rates which they charge for the identical transportation service if the final movement is by the New York, New Haven & Hartford Railroad or other rail carrier. The charging by the railroads of different rates for the same transportation from mines to Hampton Roads ports is accomplished by the collection in the first instance of a rate of $3.42 per ton, as an example, and then refunding 45 cents per ton to the shipper of the

coal on certification by him that the coal has been moved from a New England port to ultimate destination by railroad, while denying such a refund if the final movement is by a water carrier.

It was this practice and the higher rates demanded where the final movement is by water which were the subject of the complaint, appellees alleging that they constituted discrimination, preference and prejudice as between shipments and shippers by water and by rail, and as between the Blue Line, as water carrier, and the New Haven Railroad, within the prohibitions of Sections 2 and 3 of the Interstate Commerce Act.

The Grounds for the Motion to Affirm

Appellees, as grounds for this motion to affirm, submit that the appeal raises no new or substantial questions, that the decisions of this Court in the *Mechling* case and in earlier cases are controlling here, and that the three-judge court ruled correctly in the light thereof.

Despite the efforts of appellants by their jurisdictional statement to have it appear that the appeal presents novel and important issues calling for review by this Court of the decision of the three-judge district court and their contentions that the lower court's decision was at variance with established legal doctrines and would extend the provisions of the Interstate Commerce Act beyond its intended borders, nevertheless brief analysis will show that the lower court merely followed principles well established by the decisions of this Court. It is submitted, therefore, that its judgment should be affirmed on the record.

ARGUMENT

The Decision of the Lower Court Was Correct, and Required by the Decisions of This Court in the Mechling Case and Earlier Cases. The Appeal Presents No New or Substantial Questions. Therefore the Judgment Below Should Be Affirmed.

Preliminary

By their jurisdictional statement and by the use therein of such terms as "proportional rates," "revenue case," and "single increase rule" appellants would have it appear that the case has to do with a complicated freight rate and economic situation which gives rise to novel and substantial questions as to the meaning and effect of the Interstate Commerce Act, which questions were not present or decided in the *Mechling* case and in earlier cases, and that the decision of the lower court would impose unwarranted limits on the authority of the Commission under that Act. As a matter of fact, however, the facts and rates in so far as appellees' complaint was concerned were simple, involving only the charges of the few railroads named as defendants for transporting coal from mines to Hampton Roads. However, even if it were otherwise, and if many other freight rates would be affected by correcting the rates and practices complained of, this would not remove this case from the controlling effect of the decision in the *Mechling* case. For there, as here, the railroads and the Commission sought to excuse the charging of higher rates for the transportation of freight if another portion of the through movement had been by water than the rates charged if such other part of the through haul was by railroad, by the claim that a decision that such discrimination was prohibited by Sections 2 and 3 of the Act would cause a general disruption of a complicated rate structure. This Court summarily

disposed of the contention that such a consequence excused discrimination which the Act was designed to prohibit, saying (p. 580):

> "* * * The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress."

With this background appellants rest their attack on the holding of the three-judge court that the decisions in the *Mechling* case and earlier cases require the conclusion that Section 2 of the Act was violated by the rate discrimination complained of on the following contentions:

1. That the decision in the *Mechling* case cannot or should not be extended to what are here referred to as "proportional rates" and that this would "distort the purpose of Section 2" and cast doubt on the validity of a large number of "proportional rates".
2. That the lower court's decision would deprive the Commission of its authority to determine what are "like and contemporaneous services", "like kind of transportation" and what circumstances and conditions are "substantially similar" within the meaning of Section 2 of the Act.
3. That the lower court's decision deprives the Commission of authority to look "through form to substance" and conclude that although rates charged by the railroads for the same transportation service differ by 45 cents per ton, they really are "no different".
4. That the lower court's decision was contrary to the *Barringer* case.
5. That even if there was discrimination in violation of Section 2 of the Act, the appellees were not entitled to invoke the law before the District Court.

It is submitted that these contentions are without merit and that there is no substance therein.

Point I

Whether or Not the Rates for the Transportation of Coal from Mines to the Hampton Roads Ports Are Properly Described as "Proportional Rates", the Decision of the Court Below Involved Neither Extension of the Mechling Case Nor Distortion of the Purpose of Section 2 of the Interstate Commerce Act. Neither Was It Based upon a Construction of Section 2 Which Deprived the Commission of Authority Thereunder. Indeed the Decision Below Was Entirely in Conformity With the Rulings of This Court and the Established Interpretation of the Act Hence No New or Substantial Issue Is Raised by the Appeal.

The discussion under this point will be addressed to the propositions urged by appellants under Points 1, 2 and 3 of their jurisdictional statement. In these points the rates on coal to the Hampton Roads ports, the lawfulness of which was put in issue by the complaint to the Commission, are designated by appellants as "proportional rates".[3] Appellants advance various arguments to support the claim, in effect, that where proportional rates are concerned the railroads have broader latitude than otherwise to discriminate, and that the decision and decree of the court below setting aside the Commission's dismissal of appellees' complaint and holding that the Commission erred, unduly interfered with the claimed authority of the Commission, despite the express prohibition of Section 2, to permit railroads to charge more to shippers for the transportation of freight which they thereafter forward

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[3] The term "proportional rate" is generally understood to describe a rate charged for the transportation of freight which has a further movement either before or after the transportation for which the proportional rate is charged. It is part of the total charges for a through movement, *Morrell & Co. v. N.Y.C. R.R. Co.*, 104 I.C.C. 104, 128.

by a water carrier than they charge to shippers for the same service if the further movement of the freight is by railroad. It is said that this holding of the lower court constitutes an infringement upon the Commission's authority, that it distorts the purpose of Section 2, and that it ignores the economic purposes of the Act. Other and supplementary arguments are advanced to support this claim.

If new questions were thus raised and if the application, meaning and effect of Section 2 had not been previously passed upon by this court in numerous cases, the appellants' contentions might present issues meriting argument thereon before this Court. However, the questions raised are not new. This Court, not only in the *Mechling* case but also in earlier decisions, has expounded the effect and purpose of Section 2, and the decision of the lower court here does not go beyond but correctly follows the law as thus enunciated.

Thus the reference to the rates complained of as "proportional rates" creates no extension of the decision in the *Mechling* case, because there, likewise, the rates held by this Court to be unlawful were proportional rates in that they were rates for transportation constituting part of a through movement involving a prior haul by either rail or water carriers (pp. 570, 572, 573). This was the whole point of the case. And this Court clearly held that under Section 2 of the Act the Commission could not lawfully find that the charging of higher rates for transportation between two points as a part of a through movement was justified if the previous part of the through haul was by a barge carrier than the rates charged when the prior movement was by a railroad. The court said (p. 576):

> "* * * Finally § 2 of the pre-existing Act has long forbidden the Commission to authorize railroads to

> charge one person more than another for 'a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions . . .' 24 Stat. 379, 380, 40 U.S.C. § 2."

Thus in effect it held that a difference in the nature of the prior movement was not something upon which the Commission could lawfully base a finding that the circumstances and conditions under which the transportation was performed for which the different rates were charged were not "substantially similar" within the meaning of Section 2.

Hence the district court here in reaching a similar conclusion did not extend the holding in the *Mechling* case nor give to Section 2 a new and "distorted" interpretation. This is so unless the law is different where the difference in rates for the same transportation service is predicated upon the nature of a subsequent rather than a preceding factor of the through movement. Surely this cannot be the case.

Nor did the decision below, any more than did that in the *Mechling* case, distort or give a new interpretation to Section 2, in holding that the character of the prior or subsequent haul did not constitute a difference in circumstances with regard to the particular transportation for which the different rates were charged. For it has long been well settled that the provision in Section 2 regarding "substantially similar circumstances and conditions" has reference only to the circumstances and conditions of the transportation itself the rates for which are in issue. Thus, in *Int. Com. Com.* v. *Delaware, L. & W. R.R.*, 220 U.S. 235 (1911), this Court said (p. 253):

> "It is not open to question that the provisions of § 2 of the act to regulate commerce was substantially

> taken from § 90 of the English Railway Clauses Consolidation Act of 1845, known as the Equality Clause. *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U.S. 197, 222. Certain also is it that at the time of the passage of the act to regulate commerce that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or, *in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated.*" (Emphasis added)

And previously the Commission itself had ruled in *Chattanooga Packet Co.* v. *I.C.R.R. Co.*, 33 I.C.C. 384, 392, that:

> "The fact that the proportional rates to and from the Ohio River are compelled by competition can have no bearing upon our determination of the issue of unjust discrimination. The 'like circumstances and conditions' referred to in section 2 of the act are those which arise within the field of haulage, and do not include competition. *Wight v. U.S.*, 167 U.S. 512; *I.C.C. v. A.M.R.R. Co.*, 168 U.S. 144. The shippers who desire to avail themselves of the water-and-rail route must be given equal treatment with those who ship all rail."

Neither does the fact that it is an established and recognized practice for railroads to maintain proportional rates for transportation between two points of freight having a prior or further movement which are different from the local rates which they charge for freight originating and terminating at the two points support the contention of appellants. Thus, the distinction recognized by this Court in *I.C.C.* v. *Inland Waterways Corp.*, 319 U. S. 671, cited by appellants, between proportional rates and rates for local movement and the holding that Section 2 is not nec-

essarily violated thereby because freight which is being hauled as a part of a through movement may be different and the terminal operations involved may be different from those in connection with freight transported locally, has no application where the difference in rates is between one proportional rate and another proportional rate for the same part of a through movement from the same origin to the same ultimate destination. In the present case there is no question of a difference between two rates where one is a local rate for transportation from mines to Hampton Roads of coal for local delivery and consumption there and the other is a proportional rate charged for the transportation from mines to Hampton Roads of coal destined to Hartford, Connecticut, or some other point of ultimate delivery in New England. On appellants' own use of the term the only issue here is as to the lawfulness of two different "proportional rates" for the same transportation service, part of the same through movement from the same origin to the same ultimate destination. The court below did not extend any prior interpretation of Section 2 in holding that such a difference could not be justified when predicated upon whether the further movement was by water or by rail, for this was what the Commission itself had long since held as to proportional rates in the *Chattanooga Packet* case just cited and this was the holding of this Court in the *Mechling* case.

Moreover, it is significant that this Court has held that the fact that a rate is a "proportional rate" does not exempt it from the various provisions of the Interstate Commerce Act such as Section 2. *A., T. & S. F. Ry.* v. *United States*, 279 U. S. 768, 776 (1928).

In the course of their argument based upon their theories concerning "proportional rates", respondents advance other contentions to support their claim that the lower

court went beyond the decision in the *Mechling* case. They are repetitions of arguments advanced below as to why the decision in the *Mechling* case that Section 3(1) and (4), as well as Section 2 of the Act were violated should not be followed here.

One of these contentions is the claim that the lower court erred in following the *Mechling* case because there the barge lines were "connecting lines" with the respondent railroads within the meaning of Section 3(4) of the Act, whereas here (as appellants contend) the Blue Line is not a connecting line of the defendant railroads since it does not receive coal directly from them at Hampton Roads but is engaged as the final carrier to point of ultimate delivery after the coal has reached New Haven by intermediate coastwise vessels. Such a contention is beside the point here, however, because the court below did not undertake to decide whether the rates and practices of the railroads, defendants before the Commission, constituted discrimination betwen the Blue Line and the New Haven Railroad within the prohibition of Section 3(4) of the Act. Its ruling that the charging of different rates for the same transportation violated Section 2, which prohibits the charging of different rates to shippers for like and contemporaneous service in the transportation of like traffic under substantially similar circumstances and conditions, was in no way dependent upon whether the Blue Line was a "connecting line" or whether there was also discrimination against it in violation of Section 3(4). It is to be observed however, that had the lower court also ruled upon the issue under Section 3(4) it would have constituted no extension of the law as interpreted in previous decisions to have held that the fact that in the accomplishment of through transportation of coal from mines to Hartford, Connecticut, or other point of ultimate delivery, both the Blue Line and the New Haven Railroad received the coal through the inter-

mediary of a coastwise water carrier rather than directly from the coal tipples at Hampton Roads does not prevent them from being regarded as connecting carriers within the meaning and prohibition of Section 3(4). Thus in *Atlantic Coast Line* v. *United States*, 284 U. S. 288, this Court said (p. 293):

> "There is no warrant for limiting the meaning of 'connecting lines' to those having a direct physical connection with the Clinchfield. The term is commonly used as referring to all the lines making up a through route."

See, also, *Chicago, I. & L. Ry.* v. *United States*, 270 U. S. 287, at page 293, and *St. Louis S. W. Ry.* v. *United States*, 245 U. S. 136, at page 144.

Another subsidiary argument made by appellant is that the lower court erred in following the decision in the *Mechling* case because here, as appellants contend, all of the Blue Line's transportation of coal between New Haven and points of ultimate delivery is beyond the jurisdiction of the Commission, whereas in the *Mechling* case some of the barge line transportation was subject to the Commission's jurisdiction. This again is a point which might be pertinent if the lower court had undertaken to consider whether or not there was discrimination between connecting carriers in violation of Section 3(4). It is a point, however, which has no relevance to the court's ruling that the rates and practices complained of were discriminatory in violation of Section 2. Under Section 2 of the Act, this Court held in the *Mechling* case as it had previously held in *Int. Com. Com.* v. *Delaware, L. & W. R. R.*, 220 U. S. 235 (1911) and in other cases, that a difference in charges for transportation between the same two points is not excused by "differences in circumstances arising either before the service of the carrier began or after it was terminated".

But even under Section 3(4) there really is no factual difference such as suggested by appellants between the present case and the *Mechling* case. The claim that the Blue Line's transportation of coal is beyond the jurisdiction of the Commission rests upon Section 303(b) of the Act providing that Part III thereof shall not "apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities". The subdivision also provides that two or more vessels while navigated as a unit, such as a tug and several barges, shall be considered to be a single vessel. The Blue Line moves coal in bulk and the evidence shows that generally it is moved in solid tows of barges containing coal alone. However, the record also shows that the Blue Line holds a certificate issued by the Commission as a common carrier by water subject to Part III, that it does and may at any time haul a barge of coal in a tow with three or more other commodities when the transportation would be subject to Part III, and that all of its rates for the movement of coal are published in tariffs filed with the Commission, so that it may engage in the transportation of coal subject to the regulatory jurisdiction of the Commission. What is more significant, however, in so far as concerns the controlling effect of the decision in the *Mechling* case, as Commissioner Mahaffie pointed out in his dissenting report, is that that case had to do with the transportation of grain which is likewise moved in barges in bulk, the movement being exempt from the application of Part III of the Act by the same provision which it is claimed exempts the Blue Line's transportation. This Court in its opinion in the *Mechling* case certainly did not hold that the railroads were free to discriminate between a connecting railroad and a connecting water carrier in their rates for the transportation of grain if the connect-

ing water carrier happened to handle the grain in bulk in a solid tow with no other commodities and that the railroads were only barred from such discrimination if the water carrier handled the grain in a manner making its rates subject to the Commission's regulatory authority. Therefore, there is no distinction on this ground between the present case and the *Mechling* case.[4]

Appellants argue further that there is a difference in the economic background between this case and the *Mechling* case which the District Court brushed aside. It is said that in the *Mechling* case there was a deliberate attempt to deprive the barge lines of participation in traffic which they had enjoyed and induce its transfer to the rails, and it is claimed that here the rate differences complained of do not hurt the Blue Line or shippers of coal over the Blue Line who are left in the same situation in which they would be if the Commission had not authorized general increases in the railroads' rates. Certainly, however, it is as clear an injury to the Blue Line or to would-be shippers of coal over the Blue Line or other water carrier as could be imagined for the defendant railroads to demand for transportation from mines to Hampton Roads 45 cents more a ton if the Blue Line or other water carrier is used for the movement of the coal to its final destination than they charge for the same transportation if the ultimate movement is by the New Haven Railroad. The Blue Line is in the position where shippers can use its services and the advantages of cheaper water transportation only by paying a penalty in higher rates for the earlier rail service. The

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[4] It is to be noted further that Section 3(4) provides that the right of a water carrier to invoke its provisions depends upon whether the water carrier is subject to the Act and not whether the particular transportation in which it engaged is exempted or not exempted from the provisions of Part III. As stated, the Blue Line is a water carrier subject to the Act and holds a certificate issued by the Commission to this effect.

shippers are similarly penalized. Moreover, it is not as though the shippers concerned could equally well forward their coal to ultimate destination by rail, because the record shows that the facilities of both the coal dealers and receivers are designed for water movement which under the practices and rates complained of they can have only by paying the penalty of higher freight rates for the initial rail haul from mines to Hampton Roads. There is certainly no extension of the decision in the *Mechling* case in the ruling of the lower court that it is controlling in these circumstances.

Lastly, it is said that Section 2 cannot be converted into a vehicle for striking down the proportional rates involved in this case without casting doubt on the validity of other proportional rates "which are tightly woven into the fabric of the nation's railroad rate structure." Appellants would have the national transportation policy declared by Congress to preserve the advantages of water transportation yield to the protection of the fabric of the railroad rate structure against changes which might result from the removal of prohibited discrimination. However, in answer to a similar contention in the *Mechling* case, this Court, as has been previously observed, held otherwise, saying (p. 580):

> "* * * The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress. See *United States* v. *Chicago, M. & St. P. R. Co.*, 294 U. S. 499, 506-510."

It is therefore submitted that the decision of the court below constituted no extension of the *Mechling* case and presented no new or substantial question as to the effect

and purposes of Section 2 such as to warrant argument on appeal.

POINT II

Apart from the Decision in the Mechling Case, the Decision of the Court Below Was in Accordance with Earlier Decisions of This Court Interpreting and Giving Effect to the Interstate Commerce Act.

Contrary to the argument of appellants that the lower court's decision constitutes an extension of the Interstate Commerce Act and a departure from established principles which warrant argument of the issues in this Court, the fact is, as we submit, that regardless of the *Mechling* case, the lower court's ruling was in conformity with and required by the basic purposes of the Act as long enunciated by this Court.

In *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361 (1906), the Court, sustaining a finding of the Commission that certain contracts and practices of the railroads were in violation of Sections 2 and 3 of the Interstate Commerce Act (pp. 404, 405), said at page 391:

> "It cannot be challenged that *the great purpose of the Act* to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, *was to secure equality of rates as to all* and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and *forbidding* rebates, *preferences and all other forms of undue discrimination.*" (Emphasis added.)

In *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, the Court said (p. 749):

> "The legislative history of the Interstate Commerce Act shows clearly that *the evil of discrimination was the principal thing aimed at.* Senate Report No. 46, 49,

Cong. 1st Sess., p. 215; See *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 597." (Emphasis added)

Then, too, there is the landmark decision in *Wight* v. *United States*, 167 U. S. 512 (1897), where this Court early interpreted and gave effect to Section 2 of the Act, holding that whatever might be the fact with regard to other provisions of the statute, external considerations did not excuse the charging of different rates for the same transportation service. The Court said as to Section 2 (p. 518):

> "* * * It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor."

Moreover, since the rate discrimination with which this case is concerned is between the use of water as against rail transportation, it is pertinent to recall the Congressional concern for the preservation of the benefits and economies of water transportation. This was evidenced in the enactment by the Congress of Section 500 of the Transportation Act, 1920 (United States Code, Title 49, Section 142), which provided in part:

> "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

It found later expression in the Declaration of the National Transportation Policy, which was written into the law as an introduction to the Transportation Act of 1940. In discussing the enactment of this Act, and referring to

the opponents to its passage who had feared that it would result in injury to water transportation for the benefit of railroads, this Court in the *Mechling* case noted (p. 575):

> "* * * These opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service."

It is submitted that these considerations plainly dispose of the attempt of appellants to argue that the decision of the court below has the effect of depriving the Commission of authority to permit discrimination in rates under circumstances such as those here or to excuse higher rates for an identical rail service because a water carrier rather than a railroad is employed for the final movement of the freight involved. The decisions and the decision in the *Mechling* case leave no room for doubt justifying further consideration by this Court that the Commission has no such authority.

Point III

The Appellants' Contention That the District Court's Decision Is Contrary to the Decision in the Barringer Case Is Without Merit.

At page 8 of their statement, appellants assert that the refund arrangement which they presently maintain in respect to coal transported to the Hampton Roads ports is similar to a refund arrangement alleged to have been upheld in *Barringer* v. *United States*, 319 U.S. 1. They urge that "if the rate structure involved in *Barringer* is lawful, the decision of the District Court in this case is necessarily wrong". This statement reflects a misconception of issues before the Court in the *Barringer* case.

That case involved no difference in rates charged for the same transportation service over the same lines between the same points. As the Court's opinion made clear, it concerned the imposition of a loading charge on cotton shipped to the Southeast when no such charge was demanded of competing shippers on cotton shipped to Gulf ports. In language which clearly sustains the decision below in the case at bar and distinguishes the situation here from that there before it, the Court said (p. 9):

> "* * * We have repeatedly sustained a finding of the Commission that such a difference, based on a difference in identity of shippers or the ownership of the goods shipped, or on other circumstances irrelevant to the carrier service rendered, is an unjust discrimination to shippers. *Wight v. United States*, supra; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, supra; *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, supra; *Seaboard Air Line Ry. Co. v. United States*, supra; *Louisville & Nashville R. Co. v. United States*, supra; *Merchants Warehouse Co. v. United States*, supra. The distinction between those cases and this is that here the difference in the service charge is made between through shippers over different routes, and is based on relevant differences in the 'circumstances and conditions' of the total transportation services rendered by the carriers. It was within the competence of the Commission to find that this involved no unjust discrimination."

Point IV

Appellants' Contention That None of the Appellees Was Entitled to Invoke Section 2 and That the District Court Erred in Finding to the Contrary is Also Without Substance.

Under Point 5 of the jurisdictional statement, appellants argue that none of the appellees was entitled to invoke the protection of Section 2 of the Interstate Commerce Act.

In support of this proposition, appellants assert that "Only shippers have standing to invoke Section 2." They then argue that appellees Jones & Co. and Wyatt are at liberty to use either rail or water in shipping coal beyond the New England ports and thus may avail themselves of the lower rates for transportation from mines to the Hampton Roads ports, if they chose, that consequently they are not subjected to injury and that, in the absence of injury, they may not invoke Section 2.

It should be observed, first, that in the *Mechling* case this Court, on the appeal of Mechling, a water carrier like the Blue Line and not a shipper, held that Section 2 of the Act was violated.

But even as to Jones and Wyatt, appellants' argument is without factual basis. Certainly, as the lower court said, Jones and Wyatt are injured if they are required to pay higher charges for the transportation of coal from mines to Hampton Roads when they thereafter forward that coal by water, for which their facilities are designed, and when they can obtain the benefit of the lower rates only by incurring the added handling expense of shipping the coal from their yards by rail. And how about the receivers whose plants are designed for the receipt of coal by water and, in the case of the Hartford Electric Light Co., could obtain the benefit of the lower rates only by altering its plant to handle more coal delivered by railroad?

But more than this, it is well settled that a decision that rates are discriminatory in violation of Section 2 is not dependent upon proof and a finding of injury to the shippers concerned. Thus in the *Mechling* case, the Court's decision that Section 2 was violated was not predicated upon a finding that the shippers of grain were in competition with one another or that they were subjected to injury. And the Commission itself has consistently held that proof of a competitive relationship between shippers and consequent

injury is not essential to establish a violation of Section 2. In *National Spring & Wire Co.* v. *Director General*, 60 I.C.C. 564 (1921), the Commission said (p. 566):

> "* * * But, while in a situation in which there is undue preference of one shipper and undue prejudice to another, in violation of section 3 of the act, competitive relations between the parties must generally appear, *Portsmouth Asso. of Commerce v. S.A.L. Ry. Co.*, 55 I.C.C. 377, not only is such a relationship between shippers not essential to a violation of section 2, but the existence of competition between carriers does not take an otherwise unlawful discrimination out of that section."

In *Douglas & Co.* v. *Illinois Central R.R. Co.*, 31 I.C.C. 587 (1914), the Commission stated at page 592:

> "But the defendants maintain that even under the terms of Section 2 it is necessary, in order to establish discrimination, that there be an advantage to one shipper and a corresponding disadvantage to another; and they rely on the statement of the complainant's witnesses that the removal of the milling-in-transit privilege enjoyed by the Quaker Oats Company would not inure to the benefit of Douglas & Company. To this contention we are not able to give approval."

In *United States* v. *Trucking Co.*, 310 U.S. 349 (1939), this Court upheld a decision of the Commission in *Chicago and Wisconsin Points Proportional Rates*, 17 M.C.C. 573. In its report in that case the Commission said at page 579:

> "* * * The existence of a competitive relationship between shippers is not essential to a finding of unjust discrimination. Forwarders are persons within the meaning of section 2 of part I, and for like reasons, under section 216(d) of part II of the act. See *Interstate Commerce Commission* v. *Delaware L. & W. R. Co.*, 220 U.S. 235."

And in *Mitchell* v. *United States*, 313 U.S. 80, the Commission had held discriminatory certain practices of the railroads which resulted in racial discrimination. It was urged on the Court that the Commission's order was invalid because there was no evidence that the rates which the Commission found discriminatory "would subject any particular person or type of traffic to disadvantage or injury." The Court refused to accept this argument. At page 97 it said:

> "On the facts here presented * * * it is enough that the discrimination shown was palpable, unjust and forbidden by the act."

In the light of the foregoing, the District Court was clearly correct in holding that the rates and practices of the appellants in relation to the transportation of coal to the Hampton Roads ports were in violation of Section 2. The appellants' contention to the contrary is therefore without substance.

Conclusion

For the foregoing reasons it is clear that this appeal presents no new or substantial questions. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: January 23, 1952.

APPENDIX

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT

"Sec. 2. (U. S. Code, Title 49, sec. 2) That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, that it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"Sec. 3. (1) (U. S. Code, Title 49, sec. 3) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

"Sec. 3. (4) (U. S. Code, Title 49, sec. 3) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines,

or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 65-270

JAMES McWILLIAMS BLUE LINE, INC., T. A. D. JONES & CO., INC., Wyatt, Inc., The Hartford Electric Light Co., and The United Illuminating Company, Plaintiffs,

against

THE UNITED STATES OF AMERICA, ET AL., Defendants

STATEMENT FOR PLAINTIFFS-APPELLEES IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION

Plaintiffs-appellees in the above entitled cause, for their joint statement in opposition to the statement as to jurisdiction of defendants-appellants, deny that the appeal presents any new or substantial questions or any questions of public importance which cannot be disposed of on an examination of the appeal papers.

They submit that there is no material difference in the facts or issues between this case and *I. C. C.* v. *Mechling*, 330 U. S. 567, and that the determination of the questions here presented is controlled by the decisions of the United States Supreme Court in that case and in *Int. Com. Com. v. Delaware, L. & W. R. R.*, 220 U. S. 235; *Wight* v. *United States*, 167 U. S. 512, and other cases. They submit that the decision of the District Court holding that the rates and practices of which complaint was made to the Interstate Commerce Commission were discriminatory in violation of Section 2 of the Interstate Commerce Act was consistent with and required by the decisions in the cases cited and the language and purpose of the Act as there interpreted, and that the Commission's decision and order which the District Court set aside were not only erroneous in the light of these decisions but contrary to its own prior rulings in

the administration of the Act, such as that in *Chattanooga Packet Co.* v. *I.C. R.R. Co.*, 33 I.C.C. 384. And they submit that appellants' efforts by referring to the rates involved as proportional rates and as part of a complicated rate structure to create the impression that new problems are here presented and that the lower court's decision extends the ruling in the *Mechling* case and the application of Section 2, are without substance because the same character of rates, the same claim that a complicated rate structure would be disrupted by removal of the discrimination and the same basic considerations which are present here were present and dealt with by the decisions in the cases cited.

For a full statement of the contentions of plaintiffs-appellees in these regards, they respectfully refer to their motion to affirm the judgment of the District Court for the Southern District of New York, which motion is being filed contemporaneously herewith.

For the reasons outlined here and more fully stated in their motion to affirm, plaintiffs-appellees submit that no new and substantial questions are raised by the appeal which require or justify argument before the Supreme Court of the United States, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: January 23, 1952.

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No. 579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

INTERSTATE COMMERCE COMMISSION, *et al.*, *Appellants*

v.

JAMES McWILLIAMS BLUE LINE, INC., *et al.*, *Appellees*

On Appeal from the United States District Court
for the Southern District of New York

MEMORANDUM FOR APPELLANTS IN OPPOSITION TO THE MOTION TO AFFIRM

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IN THE

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INTERSTATE COMMERCE COMMISSION, *et al.*, *Appellants*

v.

JAMES MCWILLIAMS BLUE LINE, INC., *et al.*, *Appellees*

On Appeal from the United States District Court for the Southern District of New York

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MEMORANDUM FOR APPELLANTS IN OPPOSITION TO THE MOTION TO AFFIRM

Pursuant to Rule 7, Paragraph 3, of the Rules of the Supreme Court, appellants file this statement opposing the motion to affirm filed by James McWilliams Blue Line, Inc., and certain other appellees, on January 23, 1952.

Appellants note that the United States has not filed a motion to affirm and thus does not deny that the questions presented by the appeal are substantial. Of course, the United States concedes nothing as to the merits. The

basic reasons why appellants believe the questions presented are substantial and of public importance are set forth in their statement as to jurisdiction and will not be repeated here. While appellees' argument in support of their motion to affirm actually emphasizes the public importance and substantial nature of the question involved and demonstrates the necessity of this Court's noting probable jurisdiction and setting the cause down for argument, appellants feel that a short reply is required to put the issues back in proper focus.

I

Contrary to appellees' contentions, the substantial questions presented by this appeal are not foreclosed by the decision in the Mechling case.

Appellees' extensive arguments based upon *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, ignore the real issue and basis for the decision in that case. In *Mechling*, the Commission was faced with the problem of carrying out conflicting Congressional policies. The barge lines involved were admittedly "connecting lines" and entitled to the protection of Section 3(4) of the Interstate Commerce Act,[1] which provides that carriers "shall not discriminate in their rates, fares and charges between connecting lines." On the other hand, Section 307(d) of the Act gives the Commission the power, in the case of a through route, where one of the

[1] For convenience the pertinent provisions of Sections 2, 3(4), 15a, 307(d), and the Declaration of National Transportation Policy are set forth in the appendix hereto.

carriers is a common carrier by water, to "prescribe such reasonable differentials as it may find to be justified" between all-rail and rail-water routes. The Commission construed its power under Section 307(d) to justify a different treatment of connecting water lines *vis-a-vis* connecting rail lines, despite the provisions of Section 3(4). This Court reversed and in effect held that "reasonable differentials" in Section 307(d), when read in the light of the Declaration of National Transportation Policy, meant "cost differentials."

No such conflicting policies are involved here. The Commission did not purport to prescribe or approve the assailed rates under Section 307(d) and the district court in reaching its decision held it unnecessary to decide whether the Blue Line is a "connecting line" within the meaning of Section 3(4). Therefore, however this case may superficially resemble *Mechling*, the fundamental reasons which led this Court to hold unlawful the rates there involved are not present.

The rates which the district court found to be unlawful in this case are necessary to carry out the policy of the Act, which requires the Commission to preserve an adequate system of transportation by rail, and the mandate of Section 15a, which directs the Commission, in prescribing just and reasonable rates, to take into account the revenue needs of the railroads. Our position is:

First, no question of competing Congressional policies is involved here. James McWilliams Blue Line's trans-

portation of commodities from New Haven to Hartford and other points in New England is wholly unregulated by the Commission. Such unregulated transportation is not a "mode of transportation" subject to the provisions of the Act and is not covered by the Declaration of National Transportation Policy. This is clear, because it is impossible for the Commission to carry out such a policy with respect to transportation which it is powerless to regulate, and the Congress cannot reasonably have intended to impose an impossible burden upon the Commission.

This view is also supported by the legislative history of the Transportation Act of 1940 (54 Stat. 898). The bill as originally introduced[2] provided for "fair and impartial regulation of all modes of transportation." Apparently realizing that this was too broad, the Senate Committee on Interstate Commerce amended this provision to include only modes of transportation "subject to the provisions" of the Act. Moreover, during the debate on the bill, this colloquy occurred between Senator Shipstead and Senator Wheeler, the Committee Chairman who was in charge of the measure in the Senate:

> Senator Shipstead:
> "* * * But at the same time the bill contains no provision for regulating the private water carriers and other private carriers."

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[2]S. 2009, 76th Cong., 1st Sess.

Senator Wheeler:
"We are not regulating the bulk carriers either. *So the bill does not affect them.*"[3] (Italics ours.)

Second, even if this Court, by extending *Mechling*, holds that unregulated bulk transportation by barge is covered by the Declaration of National Transportation Policy, then this Court will face the problem of resolving conflicts in Congressional policy which were not involved in *Mechling*. Certainly this question would be substantial, because if the Commission, in proceedings involving general increases in railroad rates, must consider the incidental effect of such increases on unregulated transportation and in substance allow unregulated barges and other forms of transportation to participate in railroad rate increases, the mandate of Section 15a of the Act will be impossible of fulfillment.

The district court failed to look beyond the facade of *Mechling* to the foundation upon which that case rested. Consequently, in construing and applying Section 2, the court failed to consider or give weight to the Declaration of National Transportation Policy. Its decision is based on the premise that regardless of the practical necessity of the Commission's prescribing the assailed rates in order to preserve an adequate system of transportation by rail and regardless of whether unregulated barge transportation is within the coverage of the Declaration of Policy, Section 2 lays down an inflexible standard which condemns the assailed rates. It is this interpre-

[3] 84 Cong. Rec. 5877.

tation of Section 2 which has the far-reaching consequences summarized in our jurisdictional statement and which raises questions for decision by this Court which are both substantial and of public importance.

II

There is no merit in appellees' contention that even apart from Mechling the decided opinions of this Court require a finding that the Commission exceeded its statutory authority in holding that the assailed rates do not violate Section 2.

The district court relied upon *Mechling* only for the purpose of supporting its construction of Section 2. It also relied upon certain other cases decided prior to the enactment of the Transportation Act of 1940. These cases involve decisions of this Court upholding findings by the Commission of violations of Section 2. Thus, in *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, this Court upheld the finding by the Commission that Section 2 condemned the railroads' practice of charging freight forwarders a higher carload rate than ordinary shippers. In *Wight* v. *United States*, 167 U. S. 512, the Commission held and this Court agreed that it was a violation of Section 2 to give an off-line shipper an allowance for cartage while withholding it from other shippers. These cases involve obvious discriminations against shippers located in the same communities, whereby one shipper was deprived of a service or rate which was available to another shipper. In this case the assailed rates are available to all equally and

there is no unjust discrimination here in fact or in law against any appellee.

Appellees' argument is largely based upon the following quotation from *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, *supra*, where this Court said that Section 90 of the English Railway Clauses Consolidation Act of 1845, from which Section 2 was substantially taken:

> "* * * did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated." (220 U. S. at 253.)

Appellees rely upon this quotation to support their statement:

> "For it has long been well settled that the provision in Section 2 regarding, 'substantially similar circumstances and conditions' has reference *only to the circumstances and conditions of the transportation itself the rates for which are in issue.*" (Italics ours.)

If this is correct, it is difficult to see how any proportional rates could be established, and certainly it would follow that a railroad could have only one proportional rate to or from any one point, regardless of how or how far a shipment moves beyond, because the service performed by the railroad must necessarily be the same, irrespective of what happens to the shipment while it is off the railroad's line.

But neither *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co., supra*, nor *Wight* v. *United States, supra*, nor any other decision of this Court has been considered by the Commission or this Court to outlaw proportional rates, which are lower than local rates, or more than one proportional rate to or from the same point, which vary according to length of the through movement. Indeed, railroads by long-established custom have normally charged rates which are relatively lower mile for mile for long hauls than those for shorter hauls, and this practice has not been confined to hauls which are wholly by rail; it has been extended to hauls which are partly by rail and partly by other forms of transportation. As illustrative of this wide-spread practice, a number of examples of cases where railroads maintain several proportional rates to the same point, the application of which depends upon where shipments move beyond, are given in our statement as to jurisdiction.

There is nothing in *Mechling* which condemns this practice. *Mechling* actually involved four proportional or reshipping rates to the East from Chicago. Three of the rates applied only to all-rail shipments. One applied to grain originating in Illinois. Another applied to grain originating in the Northwest. A third, and lowest of the proportional rates, applied to grain originating west of the Mississippi River. The fourth proportional rate applied to grain originating in Illinois and moving to Chicago by barge. In *Mechling* this Court did not hold that barged grain had to be given the same proportional

rates as grain originating in the Northwest or west of the Mississippi. It held only that the eastern railroads had to give grain moving into Chicago via connecting barge lines the benefit of the same proportional rates that applied to grain moving into Chicago by connecting railroads from the same origins in Illinois.

As a matter of fact, the decided opinions of this Court are contrary to appellees' contentions. As long ago as 1896 this Court held that prior and subsequent transportation may be considered where proportional rates are challenged as violating Section 2. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197. And more recently this Court, in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, reaffirmed the validity of proportional rates, which differ from and are lower than corresponding local rates for the same transportation.

III

The decision below is contrary to the Barringer case.

In *Barringer & Co.* v. *United States*, 319 U. S. 1, cotton was typically collected at ginning points and shipped to compress points by rail. At the compress points the cotton was assembled in carload quantities for shipment to destination. A charge of 5½¢ per square bale was made by the railroads for loading at the compress point. This loading charge was not included in the line-haul rates but was published in the tariffs as a separate charge. It was assessable and collectible by the railroads at the time the loading service was performed, regardless of

where the loaded car moved afterwards. Nevertheless, if the car moved to points on the Gulf of Mexico, the railroads refunded the loading charges, but they made no such refund if the loaded car moved to other destinations in the Southeast.

This Court in *Barringer* stated explicitly that "It is undoubted that the loading service here involved is a transportation service to which §2 applies." 319 U. S. 1, 6. Thus, appellees' argument that the provision in Section 2 regarding "substantially similar circumstances and conditions" refers only to "circumstances and conditions of the transportation itself the rates of which are in issue" would mean that neither the Commission nor this Court, in determining whether there was a violation of Section 2, could look beyond or through the loading service which was covered by a separately-published rate to consider what happened to the cars after they were loaded. But in *Barringer* this Court did precisely that.

A comparison of the application of the rates involved in *Barringer* with those involved here may be helpful. In *Barringer*, if two cars were loaded with cotton on the same sidetrack at the same time, the railroad performed similar, or even identical, services in loading the cars and assessed the same charges which were separately published in its tariffs. Here a Pocahontas line might move two carloads of coal from the mine to Hampton Roads for transshipment beyond and collect the same charges for that service. In *Barringer*, if one of the cars subsequently moved by rail to the Gulf of Mexico, under

another separately-published provision in the railroads' tariffs the loading charge would be refunded. The loading charge would not be refunded if the other car moved to some other destination by rail, or even to the same destination partly by rail and partly by truck. Here, if one of the carloads of coal moved by a Pocahontas line to Hampton Roads, subsequently moving from a New England port to an interior destination in New England by rail, a part of the transportation charges would be refunded to the shipper to prevent the collection of an overcharge. If the other carload of coal moved to Europe or some other destination or did not move from a New England port to an interior destination in New England by rail, no such refund would be made, because there would have been no overcharge. In *Barringer* this Court held that there was no violation of Section 2. The same result is required in this case.[4]

In *Barringer* the Commission and this Court looked beyond or through a particular transportation service and the charges applicable to such service to additional transportation by rail. That is precisely what the Commission and the railroads have done here. They have looked beyond or through the service performed by the Pocahontas lines in moving coal to Hampton Roads to regulated transportation furnished by the railroads in New England, in order to divide rate increases au-

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[4]No question of Section 3(4) was involved in *Barringer*. While appellees invoked that section before the court below, the court did not pass on that issue and its decision rests solely on Section 2. Thus, appellees' argument based on Section 3(4) is irrelevant at this stage and should not obscure the controlling importance of *Barringer* on the Section 2 issue.

thorized by the Commission. The district court's failure to do so is in direct contravention of the decision of this Court in *Barringer*.

IV

Contrary to appellees' contention, none of appellees has standing to invoke Section 2.

In attempting to answer appellants' argument that none of the appellees has standing to invoke Section 2, appellees make two points:

First, that in *Mechling* this Court on the appeal of Mechling, a water carrier and not a shipper, held that Section 2 of the Act was violated. Our answer is that in *Mechling* Section 2 was only incidentally involved and the question of whether any of the parties was entitled to invoke Section 2 was not raised. That question is raised here.

Second, that "it is well-settled that a decision that rates are discriminatory in violation of Section 2 is not dependent upon proof and a finding of injury to the shippers concerned." This we deny, for unless there is injury to a shipper there can be no justiciable controversy, and neither the district court nor this Court has jurisdiction to set aside the Commission's order. Moreover, without proof of injury there can be no unjust discrimination.[5] It is true that a shipper need not show

[5] In *Mechling*, on brief, the United States and the Secretary of Agriculture conceded: "Plainly, a difference in rates can be discriminatory only where it produces injury and, where it produces injury, the different treatment can be justified only by showing that a greater burden is sustained in transporting the traffic charged the higher rate.

"* * * Injury to connecting carriers from the difference in proportional rates herein prescribed could occur only where the inbound water and rail lines compete for traffic." (Pages 68-9)

that he is in competition with another shipper in order to establish a violation of Section 2, but he must point to another shipper in the same locality who is given rates which are not available to him. None of the appellees has pointed to any such shipper.

Appellees ignore our further argument in support of our position that none of the appellees has the standing to invoke Section 2. We contend that only shippers can invoke Section 2. *Barringer & Co.* v. *United States*, 319 U. S. 1, *Williams* v. *Terminal Co.*, 315 U. S. 386. Appellees do not deny this. The only shippers involved in this case are T. A. D. Jones & Co., Inc., and Wyatt, Inc., both of whom own tidewater docks at New Haven. Each of these shippers has access to rail-ocean-rail and rail-ocean-barge proportional rates. Neither has an advantage over the other in this respect.

The important fact, however, is that neither Jones nor Wyatt, so far as the record shows, has ever shipped coal via rail from New Haven to any purchaser who can receive coal via barge. Appellees claim that the assailed rates "subsidize" the New Haven Railroad in competing with the Blue Line for the movement of coal from New Haven to interior destinations in New England. Even if this were so, the record shows that in no case has this alleged "subsidy" been sufficient to take one pound of coal off the barges and put it on the rails. Appellees do not deny this.

We submit, therefore, that as to points which can be served either by barge or by rail the rail-ocean-rail

proportionals are simply "paper" rates. Such paper rates cannot result in unjust discrimination, because they do not in fact injure any shippers or the Blue Line. Thus, the evidence supports the Commission's finding that there are no parties to this action who are subject to unjust discrimination, and the district court's action in setting aside the Commission's order under Section 2 is erroneous.

CONCLUSION

For the reasons set forth in the statement as to jurisdiction and this memorandum, we submit that the questions presented in this appeal are substantial and of public importance. These questions cannot be properly disposed of on an examination of the appeal papers. Probable jurisdiction should be noted and the cause set down for argument.

Respectfully submitted,

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February, 1952.

APPENDIX

The pertinent provisions of the Interstate Commerce Act are as follows:

Section 2 of Part I of the Interstate Commerce Act:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2)

Section 3(4) of Part I of the Interstate Commerce Act:

> All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not spe-

cifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III. (49 U. S. C. 3[4])

Section 15a of Part I of the Interstate Commerce Act:

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (49 U. S. C. 15a)

Section 307(d) of Part III of the Interstate Commerce Act:

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers

by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15. (49 U. S. C. 907(d))

The Declaration of National Transportation Policy:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions

in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (Section 1, Act of September 18, 1940, c. 722, 54 Stat. 898, 899; 49 U. S. C., notes preceding Sections 1, 301 and 901.)

No. 579. INTERSTATE COMMERCE COMMISSION ET AL. *v.* JAMES McWILLIAMS BLUE LINE, INC. ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. *Daniel W. Knowlton, H. L. Underwood, Hewitt Biaett, Martin A. Meyer, Jr., H. Merle Mulloy, John R. Wall* and *J. P. Fishwick* for the Interstate Commerce Commission et al.; and *Bernard Sobol* for the Chesapeake & Ohio R. Co. et al., appellants. *Parker McCollester* for the James McWilliams Blue Line, Inc. et al.; and *Robert W. Knox* for Wyatt, Inc. et al., appellees. Reported below: 100 F. Supp. 66.